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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-533

BURTON R. SIGNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN KENNEDY LYNCH
215 Williamson Building
Cleveland, Ohio 44114
Attorney for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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I

OPINIONS BELOW

The defendant-petitioner below was tried in the United States District Court for the Southern District of Ohio for violation of the Internal Revenue Laws, specifically a violation of Title 26, Section 7201 one count, and also a violation of Title 26, Section 7206. The defendant pleaded not guilty to both counts. The trial began on March 15, 1972 and ended March 30, 1972, the defendant being found guilty on both counts. Subsequent thereto a notice of appeal was filed on

June 1, 1972 to the United States Court of Appeals for the Sixth Circuit. On July 25, 1973 the United States Court of Appeals for the Sixth Circuit reversed the conviction of the defendant-appellant and ordered a new trial. In the opinion of the Court, when remanding for a new trial, the Court stated that it was not necessary to discuss the other errors asserted by the appellant herein, those errors being constitutional questions involving the fifth, sixth and fourteenth amendment rights of the defendant-appellant which were raised in the courts below. The district trial court rendered no formal opinion.

II

GROUNDS FOR JURISDICTION OF THIS COURT

A Per Curiam Order was filed by the United States Court of Appeals for the Sixth Circuit on July 25, 1973. In that order the Court of Appeals failed to decide several constitutional questions raised by the defendant-appellant, i.e. his rights under the fifth amendment, the sixth amendment and the fourteenth amendment to the United States Constitution. 28 U.S.C. 1254(1) is also cited together with the fact that there is a divergence of opinions on this point throughout the various districts.

III

QUESTION PRESENTED FOR A REVIEW

Petitioner advances the proposition that the rule of law is, and should be so stated, that if a defendant's trial is so tainted by the blatant, deliberate and prejudicial misconduct of the prosecutor, concurred in by the trial court, the defendant's constitutional rights to a fair trial are violated if the case is not reversed and ordered dismissed and a reversal and remand for a new trial is not the proper remedy but only compounds the initial violation of the defendant's constitutional right to a fair trial. The proper remedy being reversal and dismissal.

IV

CONSTITUTIONAL PROVISIONS

The fifth amendment to the United States Constitution, the sixth amendment to the United States Constitution, the fourteenth amendment to the United States Constituion.

V

STATEMENT OF THE CASE

Buron R. Signer was indicted by a Grand Jury on August 11, 1971, in two counts filed in the United States District Court for the Southern District of Ohio, Western Division. County One charged him of willfully attempting to evade income taxes of his wife and himself for the year 1965 by understating taxable income in the amount of $161,651.44, and understating their joint income taxes in the amount of $50,568.56, in violation of Title 26, Section 7201. Count Two charged that he filed a joint income tax return for 1965 reporting a joint taxable income of $30,653.40, whereas he knew that the joint taxable income was $192,304.84, in violation of Title 26, Section 7206. Defendant pleaded not guilty to both counts.

Motion for dismissal of the indictment on grounds of unreasonable delay was denied, with permission of the Court to renew after trial.

The defendant was tried before a jury, the Honorable Timothy S. Hogan, D.J., presiding. Trial began March 15, 1972. The prosecution contended that there were six specific items of omitted income. During the trial, on March 23, 1972, the prosecution abandoned income item number 6, thereby reducing the alleged understatement of income from $161,651.44 to $60,526.85, and the alleged understatement of tax from $50,568.56 to $30,291.78. It was on these reduced figures that the case went to the jury. After the defense pre-

sented its case, the jury found, on March 30, 1972, the defendant guilty on both counts. Defendant's renewal of motion for dismissal of the indictment on ground of unreasonable delay was summarily overruled without a hearing, as was his motion for acquittal after verdict and motion for a new trial. On May 24, 1972, the defendant was sentenced to one year and one day imprisonment. No sentence was imposed on Count Two. Notice of Appeal was filed by the defendant on June 1, 1972.

The case was reversed because of the improper acts, statements and conduct on the part of the United States Attorney and his assistant as more fully set out in the argument below.

VI

REASONS FOR GRANTING THE WRIT

PETITIONER ADVANCES THE PROPOSITION THAT THE RULE OF LAW IS, AND SHOULD BE SO STATED, THAT IF A DEFENDANT'S TRIAL IS SO TAINTED BY THE BLATANT, DELIBERATE AND PREJUDICIAL MISCONDUCT OF THE PROSECUTOR, CONCURRED IN BY THE TRIAL COURT, THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL ARE VIOLATED IF THE CASE IS NOT REVERSED AND ORDERED DISMISSED AND A REVERSAL AND REMAND FOR A NEW TRIAL IS NOT THE PROPER REMEDY, BUT ONLY COMPOUNDS THE INITIAL VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL. THE PROPER REMEDY BEING REVERSAL AND DISMISSAL.

Presented to the Court today is a very unique case, one wherein the defendant-appellant herein received a reversal of his conviction in the lower court based solely upon the blatant improper misconduct and deliberate acts of William

W. Milligan, United States attorney for the Southern District of Ohio, and one of his assistants during the course of the trial. These acts and statements were part of a scheme deliberately calculated and devised to obtain a conviction over the defendant and were first evidenced in the pretrial brief of the Government submitted to the lower court. The basic premise of any trial is that defendant, whether he is charged with income tax evasion or murder, is entitled to a fair and impartial trial at the hands of the prosecution, and whenever the prosecution deliberately, maliciously and as part of a plan and design, sets out to so depict the nature and character of the defendant as to taint the minds of the jurors so that they are precluded in their thinking and desuaded in their thinking from the logical, normal mental processes needed in keeping an open mind and remembering that every man is presumed to be innocent throughout the trial. Such a conviction cannot stand and should not result in a remand for a new trial where the defendant-appellant is subjugated again to the whims of the prosecution and to a re-trial on the same issues. The fifth amendment to the Constitution, especially that part alluding to double jeopardy, the fourteenth amendment to the Constitution of the United States alluding to due process, guarantees to any defendant the right to a fair trial, an impartial trial, an unbiased trial and also the right and guarantee that the prosecution, ie. the United States attorney and his assistants, will render to the defendant those guarantees which are afforded him by the Constitution, irrespective of their personal feelings in the matters and will conduct themselves in such a manner as to guarantee both the United States and the defendant a fair and impartial trial, the first time the matter is put before a jury. To subjugate a defendant to a new trial because of the acts of the prosecution would be to cause a complete miscarriage of justice.

The idea underlying constitutional prohibition against double jeopardy is that the state with all of its resources and powers should not be able to make repeated attempts to convict an individual of an offense, thereby subjugating him to

embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty. U.S.C.A. Constitution, Amendment 5, *Green* v. *United States,* 78 S.Ct. 221, 355 U.S. 184.

The constitutional guarantee against "double jeopardy" means that when there has been one real trial, there shall not be another, *Downum* v. *United States,* 300 Fed. 2nd, 137. As Justice Douglas stated in *Gori* v. *United States,* 367 U.S. 373, that; "The question is not whether a defendant is to receive absolution for his crime." The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can, for the same offense, be required to run the gauntlet twice. The risk of judicial arbitrariness rests, where, in my view, the Constitution puts it, on the government. As in "Downum", I would "resolve any doubt in favor of the liberty of the citizen," so spoke Justice Douglas.

The operative double jeopardy policy is to prevent the prosecution from depriving the accused of a trial by the first jury impanelled. Prosecution conduct leading to a reversible conviction is as offensive as that leading to a mistrial. Misconduct on the part of the prosecution is the most horrendous type of misconduct that can be produced in the course of a trial. The prosecutor is the people's lawyer. The members of the jury regard him as their lawyer, the representative of the United States of America. Therefore, the standard to which he is held, or should be held, is that standard compatible to his high position, and office. The members of the jury, the community at large, do not look at him as a political appointee, but rather as a separate person set apart from the rest of the community because he is clothed with the dignity of his office, legal counsel for, and the representative of the United States of America. One problem now occurs; the more outrageously the prosecutor acts, the more justifiable the mistrial and hence the more secure his opportunity to reprosecute, and it may be difficult for a judge to distinguish excessive zeal from complete incompetence or from intentional precipitation

of a mistrial or error in the trial. The basic presumption that abides with every defendant throughout any criminal trial is his presumption of innocence, this was completely devoided by the blatent and deliberate acts of the prosecution, their statements and actions in general, and can never be wiped out of the minds of the jurors, no matter what type of admonition the trial court gives to them. They hear the statements made by the prosecution, the people's lawyer, their lawyer. It is unfortunately a natural assumption on any juror's part that a person indicted and brought to trial must in some way be quilty of something. The old adage of where there's smoke there's fire prevails more and more in this day and age. One must examine the rationale of the prosecutor in making statements which they know are improper, designed to inflame the passions of the jurors in a case which basically is simple, ie. income tax evasion. This is a technical charge, not a crime of passion, not a crime involving injury to a third party, therefore, the motives and the design of the prosecution must be examined from the four corners to determine why such an approach is necessary by them to secure a conviction, in a charge which is presumably technical in nature. The trial judge who lets fatally flawed proceedings run their course should be dealt with, by adopting the rule that a defendant who is successful on an appeal may not be re-tried again for the same offense, especially when the flaws were caused by the hand and direction of the United States attorney. 77 Harvard Law Review 1272.

In his opening statement Assistant United States Attorney Winkler stated in part:

> "*You will find that after hearing all the evidence in the case, ladies and gentlemen, that Mr. Signer could not have done a more effective job in getting money out of Ringgold Building and Loan if he had went out and bought a mask, got an acetylene torch, gone in there one night and blown the vault door open.* (Emphasis added)
>
> "Mr. Lynch: Objection.
> "The Court: Yes. The jury will please disregard that." (Tr. 33, 34)

8

U. S. Attorney Milligan in his final summation to the jury recited the following:

". . . My thinking after hearing all the testimony is that putting Burt Signer in charge of the building and loan was like putting a fox in charge of the hen house. Now, with that thought in mind, I have written a little fable which I will share with you with some apologies to Mr. Aesop.

"Once upon a time there was a farmer named Ringgold who had a fine flock of chickens. One day a certain fox stopped by the farm and applied for the job of guarding the chickens. The farmer was impressed by his credentials and put the fox in charge of the hen house.

"The next morning four of the chickens were missing. At this time the fox called upon his accountant, who happened to be named Milton Foreman, to conduct an audit. Mr. Foreman noticed the missing chickens and listed them under his chicken-suspense account, meaning he didn't know what happened to them. After consulting with his client, the fox, he made adjusting entries –

"Mr. Lynch: Objection. (NOTE: The Court did not make a ruling.)

"Mr. Milligan: – listing the missing chickens under the chicken-exchange account, meaning someone doubtless would come along and replace the chickens, and two under his chicken-loan account.

"Farmer Ringgold was also concerned, so he called his accountant, John Shriver, to conduct an independent audit. Shriver also noted the chickens were missing while in the fox's custody, and he recorded the matter under his chickens-payable-fox account. He asked the fox about it, who told him, 'One, there weren't any chickens missing; and two, if there were any, he didn't owe anybody any chickens.' Accountant Shriver couldn't figure it out so he didn't complete his audit.

"The insurance company, which had insured the chickens, was also concerned and sent out an investigator, Don Hunche, to inquire. Well, he reported the missing chickens under unscheduled items, meaning that there were some unexplained losses.

"The government was also concerned and sent out Special Agent Robert Ruwe, who noticed some feathers under the roost and also noticed some blood up in the loft where the fox had been staying, and he had his suspicions, but his job was concerned with taxes. So he listed the affair under understated chickens.

"Now, the moral of this particular story, this particular fable, is that the fox ate the chickens and all the accountants in town couldn't change it." (Tr. 1325, 1326)

During final argument, Mr. Milligan displayed to the jury a blow-up version of a "Boss Tweed" Tammany Ring cartoon (copy on next page) measuring approximately 4 x 4 feet in size, which had never been introduced into evidence, and made the following remarks:

"I like political cartoons, and I hope you won't consider it humorous because I don't think it's humorous; *I think it illustrates the point.* If I show you a cartoon for the Last Century Cleveland, which was the New York Tribune, and it was to get a lot of money out of New York —

"Mr. Lynch: May I see that first?

"Mr. Milligan: Go right ahead, take a look.

'Who stole the people's money' They have a ring, everyone pointing to the man next to him.

"Who took the money from the Ringgold? Was it Graff? Was it Guilfoyle? Was it Signer?" (Tr. 1378, 1379).

By Graff's and the prosecution's own statements, all of the money $99,722.87 which the prosecution stated was the sum total of the seventeen net "overloans" would up in the bank account of Gene Graff.

"Who Stole the Money?" "It Was Him!"

All of the above statements were made by the prosecution for the sole and expressed purpose of attempting to make Mr. Signer appear to have been a *thief* who "stole money" and *"broke the building and loan"* although there was no evidence of such a criminal act ever introduced.

Judge Hogan on the 15th of March, 1972 cautioned the prosecution (Tr. 89) with the following statement:

> "This is a big B. and L. town for one thing, and the prejudice that might result in Cincinnati to just this sort of thinking, that somebody, honest or dishonest broke a B. and L., that's prejudicial in this community, so I am afraid of it."

The use of the "Boss Tweed-Tammany Ring" cartoon by the prosecution could have been only for the sole purpose of arousing the passions of the jury to believe the acts of Mr. Signer were as scandalous as that of the infamous politician "Boss Tweed" who as we all know from our high school civics teachings was accused of the stealing of millions of dollars during the late 1800's in the City of New York. The cartoon displayed by the Government is one in the same as appears in civic history books, having first appeared in the New York Times.

The prejudice it would appear formed thereby is impossible to overcome by a mere objection and admonition by the Court.

Odom v. *United States,* 377 F.2d 853 also *United States* v. *Haynes,* 466 F.2d 1260 (1972).

The fable contained such deliberate misrepresentations of fact as to infer that Shriver was the accountant for Ringgold, that Don Hunsche was sent by the insurance company and attempted to infer that the federal government had an interest in Ringgold; and more specifically; in using the expression *"Ruwe . . . noticed some blood up in the loft where the fox had been staying . . ."* was all for the sole purpose of misleading, misrepresenting and arousing through deceit and chicanery the passions and prejudices of the jury.

In giving its instructions to the jury the Court said in part:

> ". . . The distinguishing characteristics of a loan include, not only an obligation to repay, but also knowledge by the lender of the loan and the lender's consent to make the loan, an intent by the borrower and the lender that the money advanced be repaid and some agreement concerning the terms of repayment. A *burglar,* for instance, who takes money is obligated to repay it, but the transaction is not a loan, of course, because the transaction lacks all the other distinguishing factors that go to make up a loan." (Tr. 1397, 1398) (Emphasis added).

Prior to the Court's giving the above instructions, defense had entered objections to the use of the word "burglar." (Tr. 1311, 1312).

The Court also instructed the jury, in part:

> "Now, an accomplice is one who claims to have been a participant in a wrongful or illegal act in aid of or with a defendant. An accomplice is not incompetent as a witness; and the testimony of an accomplice, even though not corroborated or supported by other evidence, may be sufficient to provide an essential element of the crime or to prove an essential element of a crime beyond a reasonable doubt.
>
> "However, the testimony of any accomplice, if such he be, is to be received with caution and weighed with great care to the extent it's adverse to a defendant. A defendant should not be convicted if the testimony of an essential element of the crime comes only from an alleged accomplice unless you believe such unsupported testimony beyond a reasonable doubt." (Tr. 1393)

The Court, in referring to an accomplice insinuated to the jury that defendant had one or more others who participated with him in some crime. There was no proof or evidence that anyone aided, assisted or participated with defendant in the alleged offense of income tax evasion. See *Kotteakos* v. *U. S.*, 328 U.S. 752. There was no proof of any embezzlement or diversions, although the plaintiff often inferred that defendant had participated in such an act in connection with Ringgold Building and Loan. The failure of any proof in this regard should have been sufficient for the Court to refrain from instructions concerning an accomplice. Such instructions were prejudicial. *U. S.* v. *Bagby*, 451 F.2d 920.

In *Berger* v. *U. S.*, 295 U.S. 78, 88, the Supreme Court said in part:

> "Consequently, improper suggestions, insinuations and especially assertions of personal knowledge are apt to

> carry much weight against the accused, when properly they should carry none . . .
>
> "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence."

No proof was ever offered in the trial to indicate or establish that Ringgold Building and Loan Association at any time ever suffered any financial loss. As a matter of fact, the exact contrary was shown by the testimony of various government witnesses, including official examiners for the State of Ohio, and by defense Exhibit 8. Defense Exhibit 8 was an order of the District Court for the Southern District of Ohio, Western Division, in Bankruptcy #48480, in the matter of "New Casino Realty Corporation," *stating that the assets upon which Ringgold held mortgages had a value at least equal to the amount of the mortgages held by Ringgold.* New Casino Realty held the same real estate on which the Government claimed the "so-called" overloans were made, New Casino being a subsequent purchaser from the alleged "nominees."

We are all aware of what the "Rule of law is" but as a practical matter can any objection, admonition or instruction really wash out of a lay juror's mind a given impression made by the prosecutor who to the lay juror, the prosecutor represents the dignity, majesty and might of the United States of America.

As experienced trial counsel we know the true meaning and effect upon a lay juror when they hear remarks from what and whom they have been led to believe is "their" the peoples lawyer, the prosecutor; the representative of the United States of America versus . . . a responsibility he has to be discharged above all with dignity, fairness and justice according to the rule of law.

A trial is not a contest to see who wins or loses nor an attempt to punish one who he the prosecutor feels is guilty by any means fair or foul, but is a quest for the truth based only on the charge as set forth in the indictment. As Assistant Prosecu-

tor Winkler said to Mr. Lynch privately "We are not trying to tax case we are trying an embezzlement case." As Attorney and tax agent Ruwe told Signer "You are our pet project."

The indictment charges income tax evasion; the bill of particulars as delivered set forth six specific items. Nowhere to be found until the prosecutor's opening statement were the words or ideas concerning burglars, embezzlement, "A fox in charge of the hen house" or the idea relayed with the statement "*Mr. Signer could not have done a more effective job in getting money out of Ringgold Building and Loan if he had went out and bought a mask, got an acetylene torch, gone in there one night and blown the vault door open.*"

CONCLUSION

WHEREFORE, for the reasons above stated and in view of the divergence of the Circuit Courts and the importance of settling and establishing a rule for a fair trial in this type of case, the petitioner prays this honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for review of its decision in this case and direct the Clerk of the Court of Appeals to forward a certified copy of the record below for this purpose, or in the alternative, issue the Court's order reversing and dismissing the judgment of the trial Court without ordering a new trial.

Respectfully submitted,

JOHN KENNEDY LYNCH
Counsel for Appellant

APPENDIX

No. 72-1978

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BURTON R. SIGNER, *Defendant-Appellant.*	APPEAL from United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed July 25, 1973

Before: WEICK, Circuit Judge, and CECIL and O'SULLIVAN, Senior Circuit Judges.

WEICK, Circuit Judge. Signer, a Cincinnati attorney and building and loan association executive, was charged in a two-count indictment with attempted income tax evasion and with making and signing a false income tax return, in violation of 26 U.S.C. §§ 7201 and 7206(1). He entered a plea of not guilty, and upon trial before a jury he was found guilty on both counts. He was sentenced to one year and a day imprisonment only on Count I.

The Government's case initially was composed of six specific items of unreported income. During the trial one item was dropped; the five remaining items totaled $58,075.34 and were summarized by the Government as follows:

"SUMMARY OF ADDITIONAL INCOME – 1965

ITEM	EXPLANATION	AMOUNT
1.	INCOME FROM NEGOTIATIONS FOR RINGGOLD PURCHASE	$10,000.00
2.	INCOME FROM ACQUISITION OF CONTROL OF RINGGOLD BUILDING AND LOAN	20,000.00
3.	INSURANCE REFUNDS DEPOSITED BY DEFENDANT	1,001.72
4.	INCOME DERIVED FROM G.G.S. TRANSACTIONS	9,500.00
5.	INCOME ON TRANSACTIONS INVOLVING BEECH CORPORATION	17,573.62
	TOTAL	$58,075.34"

Signer had been attorney for, and president and director of, Ringgold Building & Loan Association (Ringgold) since 1963. The board of directors consisted of seven members, each of whom had paid $15,000 for his seat on the board. In 1964 there was disagreement among the board members, and six of them, not including Signer, desired to sell their seats for what they had paid for them.

In December, 1964, Signer met with Edward Guilfoyle and Gene Graff, neither of whom had any previous connection with Ringgold, to discuss a plan to purchase the seats of the other six directors and thereby acquire control of the building and loan association at no cost to themselves.

Under the plan Signer would continue as president, director, and attorney for the building and loan. Guilfoyle and Graff would become directors and secretary and treasurer, respectively. All three would constitute the Executive Committee. Signer was authorized by the group to draw the contract to purchase the seats of the six directors.

The money to pay the six directors who were selling their seats had to be raised within ninety days. Signer arranged for a temporary loan of $42,000 from his friend, Edward Hoemmelmeyer, evidenced by a cognovit note in the amount of $45,000, executed by Signer, Guilfoyle, and Graff and Graff's wife. Signer deposited this money to his checking account. He issued his check to Hoemmelmeyer for $2,500, as payment of advance interest on the loan. On December 30, 1964, Signer wrote his check for $35,000, payable to a trustee for the old directors, and delivered to him that check plus two checks of Graff totaling $10,000, which paid the old directors $45,000. The three, Signer, Guilfoyle and Graff, then assumed control of Ringgold.

In order to obtain money to repay the temporary loan of Hoemmelmeyer and to pay the balance owing to the old directors, a real estate company, Market Realty, was to be organized by Graff, with Signer drawing the incorporation papers. Until the corporation was set up, Graff was to operate in his own name. He was to acquire a large number of parcels of real estate, obtaining loans therefor from Ringgold, in excess of the cost of the real estate, and the overage was to be used to pay off the old directors. Title to the properties so purchased was taken in the name of nominees, who consisted of employees of Graff and friends who would execute notes and mortgages to Ringgold and receive checks for the proceeds of the loans, which checks they would endorse to Graff or to Market Realty, without even looking at the face of the checks.

Between January 1, 1965 and March 3, 1965, seventeen checks of Ringgold, signed by Signer, totaling $99,722.87, for these overloans, were deposited in the bank account of Graff or Market Realty. In addition, three other Ringgold checks totaling $30,341.45, for overloans, were deposited in Graff's checking account.

On January 11, 1965, Graff gave to Signer his check for $2,657.14, which Signer deposited in his checking account, making a notation that $2,500 of the deposit was repayment of advance for interest payment which Signer had paid Hoem-

melmeyer. Signer took a deduction on his 1964 income tax return for the interest payment to Hoemmelmeyer, although he had been reimbursed for this item by Graff prior to the filing of that return.

On February 11, 1965 Graff issued his check to Signer for $45,000 "for purchase of the Bldg & Loan", which Signer deposited in his checking account "to be used to repay loan from Ed Hoemmelmeyer." Signer then issued his check to Hoemmelmeyer for $42,000 to repay the loan, which left a balance of $45,000 owing to the old directors.

On March 24, 1965 Graff drew a check for $35,000 payable to G.G.S. Inc., a corporation owned and controlled by the three associates, and drew another check for $10,000 payable to Ringgold. G.G.S. Inc. issued its check to Ringgold for $35,000, and Signer then issued Ringgold's check for $45,000 to pay off the old directors and a certificate of deposit that had been issued by Ringgold pursuant to the purchase agreement.

Item 1 in the Summary, showing $10,000, represents the amount received by Signer from Graff out of the overloans in excess of the sums paid out by Signer. Signer claims that when he purchased the stock of Graff in G.G.S. Inc. and paid him $10,000, Graff signed a general release discharging him (Signer) of all claims owing to Graff, including the $10,000 in the Summary. The trouble with this rather ingenious contention is that Graff could not relieve Signer of his liability for the receipt of overloan funds diverted from Ringgold, or of his duty to report the $10,000 so received, as income on his 1965 income tax return.

Item 2 in the Summary is an allocation of income resulting from the acquisition of control of Ringgold. Six seats on the board of directors cost $90,000, or $15,000 per seat. Seven seats would cost $105,000; and the value of one-third control would be $35,000. Crediting Signer with one-seventh control, or $15,000, already owned by him, leaves the cost of additional control acquired by Signer as $20,000. That the control was valuable to Signer is evidenced by the fact that he was able to acquire it without resorting to use of his own funds. Also,

he was able to sell property in which he and his wife were interested, to Ringgold, at a large profit.

Item 3 in the Summary, $1001.72, represents the refund of premiums on life insurance policies taken out by Market Realty on the lives of Signer (his wife was beneficiary), Guilfoyle, and Graff, and by Beech Corporation on the life of Signer (with his wife as beneficiary). Signer deposited the insurance premium refund checks in his checking account. Market Realty and Beech Corporation had paid the premiums on these policies. Signer received the refund of premiums on the policies on his own life; he had no authority to receive and retain the refund of premiums on the policies of Graff and Guilfoyle.

Item 4 in the Summary, $9,500. Signer admitted receiving $10,000 from G.G.S. Inc., but he claims that he repaid $1,000 thereof by check to Graff, and that the balance was part of a check of Hickman Realty Company to G.G.S. Inc. There was evidence, however, that Signer did make a loan of $1,000 to Graff, but that Graff repaid the loan in full. The check of Hickman Realty to G.G.S. Inc. for $50,000 was the purchase price of shares of G.G.S. Inc. stock. Hickman Realty was owned and controlled by Signer and his wife.

Item 5 in the Summary: Beech Corporation, $17,573.62. Beech Corporation during 1965 was performing construction work on the building which housed Ringgold. The work was financed by a construction loan made by Home Federal Savings & Loan to Hickman Realty Company, the then owner of the property. The loan was secured by a note and mortgage executed by Hickman, which note was also signed by Signer. A false affidavit was filed with Home Federal indicating that $27,031.86 of work had been performed by Beech Corporation, whereas in truth and in fact only $7,000 of work had been performed. As a result of this false affidavit, Home Federal issued its check to Beech Corporation and Hickman Realty for $27,031.86, and of this sum Signer received the amount of $17,573.62. He claimed that this amount was not income to him because he was personally liable on the Home Federal note. The trouble with this contention is that Home Federal was

paid the full amount due on its note and mortgage when Hickman Realty sold the property to Ringgold in 1965, at a large profit. There was nothing in the papers to indicate that Home Federal or Hickman was lending this sum to Signer. On the contrary, in the 1965 income tax return of Hickman Realty its basis for the property included the entire cost of the Home Federal mortgage loan without any credit for the moneys paid under the false affidavit.

Among his defenses, Signer contends that his auditor prepared and signed his income tax return. The auditor, however, was not furnished full information by Signer; the auditor knew nothing of the Ringgold overloans.

Signer claims error in the denial of his motions for judgment of acquittal. While the evidence in some particulars is conflicting, we are of the opinion that there was substantial evidence to support the verdict of the jury. There was evidence of a substantial understatement of tax in the return which Signer filed; he had knowledge that the return was incorrect, and the omissions were wilful. *Spies* v. *United States,* 317 U.S. 492 (1943); *United States* v. *DeNiro,* 392 F.2d 753 (6th Cir.), *cert. denied,* 393 U.S. 26 (1968).

In the consideration of a motion for judgment of acquittal the trial court must consider the evidence, as well as the inferences to be drawn therefrom, in the most favorable light to the Government. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Collon,* 426 F.2d 939 (6th Cir. 1970).

Signer contends that the Court erred in not withdrawing entirely from consideration by the jury, the evidence concerning his profit of about $100,000 in the sale of a building to Ringgold in October, 1965. This was item 6, and was included in the indictment, but during the trial the Government withdrew that item. The Court was careful to instruct the jury that the evidence could not be considered as additional income in 1965, but could be considered only for such "weight as you see fit to give it under such questions as wilfulness and intent of the defendant, if any, and the general relationship, if any, with the Ringgold Association." It was

an item of self-dealing, and was relevant on the issue of control which Signer and his associates purchased with funds diverted from Ringgold. *Moore* v. *United States*, 412 F2d 974 (5th Cir. 1969).

Signer argues that there was no proof that Ringgold lost any money on the overloan mortgages, and intimates that they were paid in full. It is clear to us that Ringgold did lose the funds which were diverted on these overloans and which totaled more than $130,000.

Signer contends that he was deprived of a fair trial because of prejudicial remarks made by the Assistant United States Attorney in his opening statement to the jury and in the opening and closing arguments to the jury of the United States Attorney.

The opening statement of the Assistant United States Attorney contained the following language:

> "You will find that after hearing all the evidence in the case, ladies and gentlemen, that Mr. Signer could not have done a more effective job of getting money out of Ringgold Building and Loan if he had went out and bought a mask, got an acetylene torch, gone in there one night and blown the vault door open."

Objection was made by counsel for defendant, which objection was sustained by the Court, and the jury was instructed to disregard the statement.

Signer was on trial for income tax evasion and not for diversion or misapplication of building and loan funds. The statement was improper and, in our judgment, very prejudicial.

The purpose of the opening statement of the prosecution is to outline broadly the facts of the case so that the jury will understand the evidence as it unfolds. The opening statement should not be used to poison the minds of the jury against the defendant before the jury has heard the evidence, or to improperly prejudice the defendant in the eyes of the jurors,

or to destroy his credibility. *Government of Virgin Islands* v. *Turner*, 409 F.2d 102 (1st Cir. 1969); *Leonard* v. *United States*, 277 F.2d 834 (9th Cir. 1960).

But this was not all. In the United States Attorney's opening argument to the jury, he recited a fable which he composed, with apologies to Aesop, using Signer as the fox in the chicken coop.[1]

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[1] The following excerpt from plaintiff's opening statement appears at pages 1324 to 1326 of the transcript:

"The testimony indicates that the original plan to take over the Ringgold was hatched by Signer, Graff and Guilfoyle at the Fox and Crow. I have been thinking about that word 'Fox'. I think it's sort of suggestive in this particular case. My thinking after hearing all the testimony is that putting Burt Signer in charge of the building and loan was like putting a fox in charge of the hen house. Now, with that thought in mind, I have written a little fable which I will share with you with some apologies to Mr. Aesop.

"Once upon a time there was a farmer named Ringgold who had a fine flock of chickens. One day a certain fox stopped by the farm and applied for the job of guarding the chickens. The farmer was impressed by his credentials and put the fox in charge of the hen house.

"The next morning four of the chickens were missing. At this time the fox called upon his accountant, who happened to be named Milton Foreman, to conduct an audit. Mr. Foreman noticed the missing chickens and listed them under his chicken-suspense account, meaning he didn't know what happened to them. After consulting with his client, the fox, he made adjusting entries —

"MR. LYNCH: Objection.

"MR. MILLIGAN: — listing the missing chickens under the chicken-exchange account, meaning someone doubtless would come along and replace the chickens, and two under his chicken-loan account.

"Farmer Ringgold was also concerned, so he called his accountant, John Shriver, to conduct an independent aduit. Shriver also noted the chickens were missing while in the fox's custody, and he recorded the matter under his chickens-payable-fox account. He asked the fox about it, who told him, 'One, there weren't any chickens missing; and two, if there were any, he didn't owe anybody any chickens.' Account Shriver couldn't figure it out so he didn't complete his audit.

"The insurance company, which had insured the chickens, was also concerned and sent out an investigator, Don Hunsche, to inquire. Well, he reported the missing chickens under unscheduled items, meaning that there were some unexplained losses.

"The government was also concerned and sent out Special Agent Robert Ruwe, who noticed some feathers under the roost and also noticed some blood up in the loft where the fox had been staying, and he had his suspicions, but his job was con-

As if this were not enough, in his closing argument to the jury the United States Attorneys displayed to the jury a blown-up cartoon of a "Boss Tweed Tammany Ring", measuring four by four feet, and showing a number of disreputable looking characters, each pointing a finger at the one standing next to him. Under the cartoon, in large letters appeared the following: "Who Stole the Money?" "It was Him." This cartoon was not in evidence.

In his remarks during final argument, the United States Attorney told the jury:

> "I like political cartoons, and I hope you won't consider it humorous because I don't think it's humorous; I think it illustrates the point, if I show you a cartoon for the Last Century Cleveland, which was the New York Tribune, and it was to get a lot of money out of New York—
>
> "MR. LYNCH: May I see that first.
>
> "MR. MILLIGAN: Go right ahead, take a look.
>
> "'Who stole the people's money:' They have a ring, everyone pointing to the man next to him.
>
> "Who took the money from the Ringgold? Was it Graff? Was it Guilfoyle? Was it Signer?" (Record, 1378-9).

As before stated, Signer was on trial for income tax evasion only, and it was not proper to attempt to try him for something else; nor is it proper to appeal to the passions and prejudices of the jurors. Cincinnati is wellknown as a building and loan center, with a large number of associations doing business in the city, which associations without a doubt had many depositors. The depicting of Signer as a thief looting a building and loan association, could not help but prejudice him in the eyes of the jury.

It should be pointed out further that the factual issues in this case were complex and were admitted by the prosecution

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cerned with taxes. So he listed the affair under understated chickens.

"Now the moral of this particular story, this particular fable, is that the fox ate the chickens and all the accountants in town couldn't change it."

to be confusing. In this posture, the defendant had the right to have the issue of whether he wilfully attempted to evade income taxes, determined dispassionately. Signer, along with his associates, did divert funds from the building and loan but he could not properly be likened to a thief or a masked burglar.

Even though the cartoon was not objected to by the defendant, we may notice it as a plain error affecting the substantial right of the defendant to a fair trial. Rule 52(b), Fed.R.Crim.P.; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Benson*, 389 F.2d 376 (6th Cir. 1966), *cert. denied*, 391 U.S. 903 (1968).

Because of prejudicial remarks made by the Assistant United States Attorney in his opening statement to the jury, and prejudicial remarks of the United States Attorney in his opening and closing arguments to the jury, including the exhibition of the cartoon to the jury, all of which in our opinion operated to deprive the defendant of a fair trial, the judgment of conviction is reversed and the case is remanded for a new trial.

In view of this disposition of the case, it is not necessary to discuss other errors asserted.

Reversed.

SUPREME COURT, U.S.
FILED
NOV 14 1973

No. 73-533

In the Supreme Court of the United States

OCTOBER TERM, 1973

BURTON R. SIGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on one count each of tax evasion and filing of a false income tax return, in violation of Sections 7201 and 7206, Internal Revenue Code of 1954. On appeal, the Sixth Circuit reversed and remanded for a new trial on the ground that remarks made by the prosecutors deprived petitioner of a fair trial (Pet. App. 15-24).

Petitioner's sole complaint (Pet. 4-6) is that the Fifth Amendment prohibition of double jeopardy and the Fourteenth Amendment requirement of due process bar any further trial for these offenses. It has long been established, however, that "a person can be tried a second time for an offense when his prior conviction for that same offense has been set aside by his appeal." *Forman* v. *United States,* 361 U.S. 416, 425. This rule

was originally established in *United States* v. *Ball,* 163 U.S. 662, 672, and has recently been reaffirmed in *United States* v. *Jorn,* 400 U.S. 470, 484. See also *Bryan* v. *United States,* 338 U.S. 552, 560; *Green* v. *United States,* 355 U.S. 184, 189; and *North Carolina* v. *Pearce,* 395 U.S. 711, 719-720.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

DOJ-1973-11